IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO: 2014-CA-01139

DELLA SUMRALL and ROY SUMRALL — APPELLANTS/PLAINTIFFS

V.

SINGING RIVER HEALTH SYSTEM — APPELLEE/DEFENDANT

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CAUSE NO: 2012-00129(1)

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

COUNSEL FOR THE APPELLANT

ROBERT W. SMITH (MSB 7595)
Attorney at Law
528 Jackson Avenue
Ocean Springs, MS 39564
Tel. 228 818-5205
FAX 228 818-5206
rwsmithatty@bellsouth.net

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V.

SINGING RIVER HEALTH SYSTEM APPELLEE/DEFENDANT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following persons or entities have an interest in the outcome of this case.

1. Appellant/Plaintiff, Roy Sumrall
2. Appellant/Plaintiff, Della Sumrall
3. Appellees/Defendant, Singing River Health System, an entity operating a hospital system in Jackson County, MS
4. Ocean Springs Hospital, a hospital located in Ocean Springs, MS
5. Counsel for Appellants/Plaintiffs, Robert W. Smith
6. Counsel for Appellees/Defendants, Joshua Danos, Brett Williams, Roy Williams
7. All members of the law firm Dogan, Wilkinson, Williams, Kinard, Smith & Edwards.
8. Honorable Robert Krebs, Circuit Court Judge of 19th Circuit Court District.

*s/ Robert W. Smith*___
ROBERT W. SMITH
Counsel for Appellant

ORAL ARGUMENT REQUESTED

Oral argument is requested in this case as we would be most interested in watching Defense counsel answer insightful questions from intelligent judges. Questions would hopefully be asked such as: How do you justify telling your client to ignore a lawfully served subpoena? Why do you expect this court to allow expert testimony on the nursing standard of care from an expert who is never tendered or qualified in the specialty of nursing? Why was the Plaintiff held to an overwhelming burden of proof, rather than a preponderance of the evidence? Do you agree that the judge's theory of plaque in the jugular vein is scientifically and medically impossible? None of these questions were answered in the court below.

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STATEMENT OF THE ISSUES

I. Whether Defendant's sole physician expert witness should have been allowed to testify that there was no breach of the nursing standard of care without being tendered or qualified as a nursing care expert and without articulating any nursing standard of care whatsoever.

II. Whether the circuit court erred in denying Plaintiffs' motion for partial summary judgment establishing the nursing standard of care.

III. Whether the trial judge erred in requiring Plaintiffs' burden of proof to be overwhelming as opposed to a preponderance of the evidence.

IV. Whether the trial court's findings of fact and conclusions of law was against the overwhelming weight of the evidence.

V. Whether the cumulative errors denied Plaintiffs a fair trial.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is an appeal from a Jackson County circuit court judge's decision in a State Tort Claim Act case. The civil action is predicated on nursing negligence in which a nurse removed a patient's central line [1] with the patient sitting up in a chair resulting in an air embolism, [2] cardio/pulmonary arrest and massive anoxic brain damage.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

A complaint was filed on May 18, 2012 by Roy and Della Sumrall in the circuit court of Jackson County alleging that a nurse employed by Ocean Springs Hospital was negligent in removing a central line while Della Sumrall was sitting up in a chair waiting discharge from the hospital after gallbladder surgery. Plaintiffs alleged improper removal of the central line caused an air embolism, cardio/pulmonary arrest and anoxic brain damage. (CR 24)[3]

Plaintiffs immediately requested to take the nurse's deposition and gave defense counsel 38 dates from which to pick. Defense counsel refused all 38 dates. (CR 66) Plaintiffs then subpoenaed the nurse for a deposition on July 16, 2012. The nurse appeared at Plaintiffs' counsel's office for the deposition, but immediately drove off on telephonic instructions from Defense counsel, Brett Williams, who failed to appear for the deposition at all. (CR 109) The trial judge, Honorable Robert Krebs, was immediately contacted via conference call and was informed that Defense counsel had been given 38 dates for a deposition, that the witness nurse,

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[1] A central line is a catheter placed in the jugular vein which is part of the central venous system.

[2] An air embolism is an air bubble that enters the central venous system when a hole in the venous system is exposed to air because ambient air is under greater pressure than blood in the human venous system above the level of the heart. This pressure differential causes air to flow into the vein.

[3] Designations to the record contained in this brief are: CR=Clerk's Record; TR=Transcript; RE=Record Excerpts

Chequita Steele, was under subpoena, that the deposition was properly noticed, that the deponent had appeared then left, and that Defense counsel failed to appear at all. Judge Krebs refused to enforce the subpoena or the Notice of Deposition. (CR 73) (RE 24)

The Plaintiffs then noticed, by agreement, the deposition of a Dr. Edward Dvorak, a fact witness and the attending physician for Mrs. Sumrall, for August 15, 2012. Judge Krebs subsequently quashed the notice of deposition by order dated August 9, 2012, stating that Plaintiffs must pay not only Dr. Dvorak, but all employed fact witnesses in the case "a reasonable hourly fee." (CR 123) (RE 25, 48-49) (Dr. Dvorak had sent a pre-deposition bill demanding $400 per hour. His deposition was estimated to be approximately three hours.) The judge's order effectively prevented use of subpoenas in the entire case for discovery depositions or trial as paying several fact witness medical care providers hourly fees was cost prohibitive.

During the course of the case, Plaintiffs filed six motions to compel discovery. Judge Krebs substantively denied each and every motion. (CR 73, 123, 294-296, 318)

In accordance with the scheduling order, Singing River Health System designated experts on April 15, 2013. (CR 341-346) (RE 63-65) None of Defendant's experts were designated to opine what the nursing standard of care was. Rather, each was simply designated to state the bald conclusion that Chequita Steele did not breach the standard of care. (CR 341-346) (RE 63-65)

Plaintiffs filed a motion *in limine* to exclude any undisclosed expert opinions (CR 791), a second motion to exclude the Defendant's experts' bald conclusions of "no breach of the standard of care" (CR 800), and a third motion for partial summary judgment establishing the standard of care for a nurse removing a central line. (CR 834) As opposed to Defendant's experts' bald conclusions, Plaintiffs' experts set forth in their respective designations and also by

sworn answers to interrogatories and by depositions, the precise applicable nursing standard of care. (CR 324-340)

The trial judge denied all of Plaintiffs' motions without stating an iota of reasoning or rationale. (CR 1305-1306) (RE 34)

The case was a state tort claim and thus proceeded to trial before Judge Krebs on December 9, 10 & 11, 2013. During the course of the trial, Defendants called only one expert witness, Dr. Jim Corder, an anesthesiologist. Over Plaintiffs' vehement objections, Dr. Corder was allowed to testify that Nurse Chequita Steele "did not violate the nursing standard of care," and further that this "event" was not an air embolism but rather was a stroke. Dr. Corder was never tendered as an expert in the specialty of nursing, never testified that he had familiarity with the nursing standard of care, and had never stated any opinion in pre-trial designations that Mrs. Sumrall had experienced a stroke. (CR 341-346) (TR 340-380)

As opposed to Dr. Corder's conclusory opinions, Plaintiffs presented a double board certified vascular neurologist stroke expert who trained nurses on central line removal, a registered nurse expert, the sworn testimony of Singing River Health System's own nurse and medical records containing the opinions of five physicians (three of whom were employed by Defendant Singing River Health System), all verifying that this event was an air embolism caused by improper removal of a central line while the patient was sitting up in a chair. Plaintiffs additionally presented overwhelming and voluminous medical literature documenting the applicable standard of care for a nurse removing a central line. (TR 19-139, 187-203, 204-249) (Ex P-14) **No medical provider in this case testified that Mrs. Sumrall had a stroke and no test result showed she had a stroke.**

Four months later, on April 29, 2014, Judge Krebs entered his findings of fact and conclusion of law. (CR 1324-1329) (RE 36-41) Judge Krebs concluded that there was no air

embolism, that the event was a stroke or "perhaps" a heart attack, that there is no nursing standard of care and that there was therefore no breach of any standard of care. (CR 1324-1329) (RE 36-41)

Plaintiffs filed their motion for new trial and/or to alter or amend the Findings of Fact and Conclusions of Law which was denied by Judge Krebs on July 18, 2014. (CR 1352) (RE 43) This appeal followed.

C. STATEMENT OF FACTS

On Wednesday, February 29, 2012, at 4:00 p.m., Della Sumrall was dressed and sitting up in a chair chatting with her daughter and eagerly awaiting discharge from Ocean Springs Hospital after a six day stay for gall bladder surgery. Mrs. Sumrall would never make it home.

At 4:05 p.m., a nurse named Chequita Steele entered the room to discharge Mrs. Sumrall, noticed a central line was still in Mrs. Sumrall's jugular vein and decided to remove it without a doctor's order. Nurse Steele donned gloves, grabbed the central line and pulled it out. Mrs. Sumrall immediately started gasping for breath, stated "I can't breathe" and slumped over in the chair unresponsive. A code was called and numerous medical personnel responded to find Mrs. Sumrall still in the chair. (TR 147-150) The emergency personnel placed Mrs. Sumrall flat on her bed. An oxygen saturation level was taken which showed an oxygen level of 28, a finding which shows a catastrophic lack of oxygen and pulmonary arrest.

A responding pulmonologist employed by Defendant Singing River Health System, Dr. Rodberg, asked a nurse responder what happened and the nurse replied "air embolism." The air embolism blocked Mrs. Sumrall's pulmonary system, causing subsequent cardiac arrest and ceasing the flow of oxygen to the brain and the body. (TR 19-72)

Mrs. Sumrall suffered massive global anoxic encephalopathy and is now permanently confined to a nursing home. (TR 19-72) Della Sumrall does not know what year it is, needs 24 hour nursing assistance and cannot walk or eat unassisted and will never return home. (Ex P-4)

Della Sumrall and her husband of 54 years, Roy Sumrall, filed notice of claim against Ocean Springs Hospital and Singing River Health System on April 10, 2012. The claim was administratively denied and Mr. and Mrs. Sumrall filed suit in Jackson County Circuit Court against both Defendants on May 18, 2012. (CR 24) The case was assigned to Judge Robert Krebs. From the initial attempt at scheduling Nurse Chequita Steele's deposition, it was evident that there would be trouble. Plaintiffs' counsel provided 38 dates for the taking of Ms. Steele's deposition, Defense counsel, Roy Williams, refused all of 38 dates and stated no depositions would be allowed until Plaintiffs had been deposed and had responded to Defendant's written discovery. (CR 66)[4] Plaintiffs responded by noticing Steele's deposition and subpoenaing her. (CR 81-84) Steele appeared at Plaintiffs' counsel's office on July 16, 2012 for the deposition, but hospital's counsel failed to appear. Ms. Steele called Defense counsel Brett Williams on the telephone. Mr. Williams instructed Steele to disregard the subpoena and leave. (CR 109) When Judge Krebs was immediately informed of these precise facts in a conference call, he refused to enforce the subpoena and giving no reason or rationale instructed counsel to reschedule the deposition. (CR 73) (RE 24)

Plaintiffs next attempted to take the deposition of Dr. Edward Dvorak, Della Sumrall's treating physician. Judge Krebs immediately quashed the deposition notice and ordered

[4] It is notable that Mr. Williams' position that Plaintiff would not be allowed to conduct the deposition until Defendant had conducted discovery flies in the face of M. R. Civ. P. Rule 26(e). The rule provides that one party's discovery shall not be delayed just because another party is conducting discovery.

Plaintiffs to pay Dr. Dvorak a "reasonable hourly fee" before the deposition could be taken.[5] (CR 123) (RE 25)

When Plaintiffs' counsel stipulated that he would not ask Dr. Dvorak any expert opinion questions whatsoever, but would only ask fact witness questions, Judge Krebs issued a blanket ruling that all persons "who hold a job" including "doctors, lawyers and Indian chiefs" would be entitled to hourly fees for responding to subpoenas even if they are just fact witnesses.[6] (RE 44-49) Judge Krebs also announced this ruling would apply to all cases in his courtroom. Plaintiffs' counsel knows of no other case and no other witness to whom this rule has ever been applied.

On April 15, 2013, Defendant designated experts including two nurses and Dr. Jim Corder, an anesthesiologist. (CR 341-346) (RE 63-65) None of the experts named by Defendant were designated to articulate what the applicable standard of care was for a registered nurse removing a central line. Each of the Defendant's experts was designated to simply state the conclusion that Nurse Chequita "did not breach the applicable nursing standard of care." (CR 341-346) (RE 63-65)

Plaintiffs subsequently filed a motion requesting partial summary judgment establishing the standard of care since Plaintiffs' experts were the only experts designated who articulated the standard of care. (CR 834) Plaintiff also filed a motion *in limine* seeking to exclude any of the designated defense experts from coming to trial and attempting to state a standard of care never disclosed in expert designations. (CR 791) Plaintiffs further requested that defense experts be

[5] Dvorak informed the court he would bill $400 per hour.
[6] The court's ruling immediately made any further factual discovery in the case cost prohibitive as 95 percent of the numerous fact witnesses were doctors and nurses.

precluded from stating the bald conclusion of "no breach of the standard of care" without first articulating any standards to which they were referring. (CR 800)

Judge Krebs denied all of the Plaintiffs' motions and requests without comment. (CR 1305-1306) (RE 34-35)

Plaintiffs were thus compelled to start trial without the ability to have subpoenas enforced, with the impediment of a cost prohibitive order requiring payment of thousands of dollars to pure fact witnesses if they were subpoenaed, and without being informed of any standard of care to which Defense experts would supposedly testify. More surprises were soon to occur during trial.

The trial took place on December 9, 10 & 11, 2013 before Judge Krebs in Pascagoula, Mississippi. Plaintiffs called Dr. Lidgia Vives, a double board certified vascular neurologist stroke specialist and Crystal Keller, a registered nurse, as expert witnesses.

Dr. Vives testified that Della Sumrall did not have a stroke and that Mrs. Sumrall's global anoxic encephalopathy was caused by an air embolism resulting from improper removal a central line while she was sitting in a chair. (TR 19-72) This testimony and Dr. Vives' opinions were consistent with the opinions of every treating physician in Mrs. Sumrall's medical record, many of whom were employed by the hospital.

Nurse Crystal Keller, as well as Dr. Vives, testified that the applicable standard of care for a registered nurse removing a central line consisted of four key steps:

1. Educate the patient about the procedure;
2. Place the patient in Trendelenberg position (lying on back with upper torso inclined downward so central line insertion site is below the heart);
3. Perform Valsalva maneuver (have patient take deep breath and bear down);
4. Upon removal, apply pressure and impermeable gauze at site of removal.

(TR 204-231; TR 46-47)

Dr. Vives and Nurse Keller explained that these steps were medically necessary because ambient air pressure is greater than venous blood pressure above the heart and an open hole can be a pathway for air to enter the venous system. Dr. Vives explained this process is exactly what happened to Della Sumrall here as clearly evidenced by Mrs. Sumrall immediately gasping for breath, having a pulmonary cardiac arrest and having an oxygen saturation level of 28. Dr. Vives stated Mrs. Sumrall did not have a stroke and did not have a heart attack. (TR 55, 68-72, 138-139) The post event CT scan showed no blockage and no stroke site and was completely consistent with global anoxic encephalopathy over the entire surface of the brain. (TR 70) Myoclonic seizures (generalized seizure involving both sides of the body) appeared soon after the event which also evidence global brain injury. (TR 394) The troponin (cardiac enzymes) were elevated because of leakage from the heart when it stopped pumping due to a pulmonary cardiac arrest, not from an initiating heart attack. (TR 116-118)

Dr. Vives and Nurse Keller testified that these nursing standards of care were well known and supported by voluminous medical literature. (TR 24-26, 208-225) Johns Hopkins Hospital (an internationally known and recognized hospital) policy and procedure states that use of the Trendelenberg position for removal of central lines is imperative. (TR 30-33)

The occurrence of an air embolism in a hospital setting is so easily preventable that Medicare has listed "air embolism in hospital setting" as a "never event." (TR 33-35) Never events are defined by CMS (Center for Medicaid and Medicare Services) and by NQF (National Quality Forum) as "errors in medical care that are clearly identifiable, preventable, and serious in their consequences for patients, and that indicate a real problem in the safety and credibility of a health care facility." (TR 32-34)

The Department of Health defines a never event as a "serious largely preventable patient safety incident, that should not occur if the available preventive measures have been implemented by health care providers." (TR 35)

In addition to the testimony of its two retained experts, Plaintiffs introduced Della Sumrall's medical records from Defendant Singing River Health System (Ex P-1) which contained the admissions and opinions of Singing River Health System's own staff as follows:

> Nurse Note: 16:45, Katy Lorenzo: "rapid response called on 2 East. Patient sitting up in chair unresponsive to verbal command." (OS 1419)
>
> Dr. Rodberg (pulmonologist): "Apparently while seated in the chair, the patient's central line was removed." (OS 0050)
>
> Dr. McShurley (internal medicine): "Shortly prior to discharge, the patient's central line was removed. Apparently was sitting in a chair and … became unresponsive." (OS 0207)
>
> Dr. Rodberg (pulmonologist and employee of Singing River Health System): Impression: (1) probable air embolus from removal of central line (2) near respiratory arrest (3) shock secondary to air embolus. (OS 0052)
>
> Dr. Karcher (neurologist): It is suspected that she may have had an air embolus due to removal of the central line. (OS 0047) Assessment: possible anoxic brain injury status post near respiratory arrest yesterday with subsequent myoclonic jerks. (OS 0049)
>
> Dr. Taylor (pulmonologist and employee of Singing River Health System): probable air embolism with resultant cardiovascular collapse and possible anoxic brain injury. (OS 245)
>
> Dr. Roth (internal medicine and employee of Singing River Health System): She had a little bit of air embolus associated with the venous process resulting in near cardio-pulmonary arrest. (OS 229)
>
> Dr. McShurley (internal medicine and employee of Singing River Health System): (3/4/12) shock probably due to air embolism resulting in cardio-vascular collapse secondary to removal of central line in the upright position. (OS 214)
>
> Dr. Taylor (pulmonologist and employee of Singing River Health System): probable air embolism with resultant cardiovascular collapse. (OS 231)

In addition to the testimony of Dr. Vives, Nurse Crystal Keller and the above cited entries by five doctors in the medical record, Plaintiffs also called Ocean Springs Hospital nurse, Jenna Blaine. Ms. Blaine testified that she removed a second central line from Della Sumrall on March 19, 2012, just 20 days after the February 29, 2012 incident, while accompanied by a Singing River Health System "patient care representative" who was present precisely to assure the procedure was done correctly. Nurse Blaine explained that she placed Mrs. Sumrall in Trendelenberg position, removed the central line and applied pressure – the exact steps which Plaintiffs' experts and the applicable medical literature stated were the nursing standard of care. (TR 187-198)

In addition to the above evidence, Plaintiffs introduced the sworn deposition of Dr. John Weldon, a hospitalist and full time employee of Singing River Health System who was not on duty on February 29, 2012, but who later rendered care to Mrs. Sumrall during her extensive hospital stay. (Ex P-5). Dr. Weldon had made a one line entry in Della Sumrall's voluminous medical record in which he wrote on March 5, 2012, several days after the central line incident, "I think she had a stroke." Dr. Weldon explained under oath in his deposition that he had no opinion on the etiology of Mrs. Sumrall's condition, that the root cause could well be air embolism, and that his later entry in the medical record referencing a stroke was simply meant to document that stroke was part of his differential diagnosis. (Ex P-5; pp 20-23, 27, 34, 40-41, 44) (RE 54-62) Dr. Weldon confirmed there were no test results which confirmed a stroke, that he was not offering an opinion that Della Sumrall had a stroke, and he had no opinion as to whether stroke or air embolism was more probable. (Ex P-5; pp 40-41) (RE 61-62) When asked what he would do if he saw a Singing River Health System nurse getting ready to pull a central line from a patient sitting up in a chair, Dr. Weldon said "I would stop her." When asked why, he stated, because "that's not the right way to do it." (Ex P-5; p 44)

In addition to the deposition of Dr. Weldon, Plaintiffs introduced the deposition of Dr. James Martin, a family doctor and director of Ocean Springs Nursing Center, who has provided on-going care for Della Sumrall since her discharge from Ocean Springs Hospital. (Ex P-6)

Dr. Martin testified that based on his review of the Ocean Springs Hospital records and multiple personal examinations of Della Sumrall, that her diagnosis was probable air embolism, respiratory arrest, and shock secondary to air embolism. Dr. Martin confirmed Mrs. Sumrall is still bedbound, has little likelihood of rehabilitation or improvement, has dysarthria, garbled speech, inability to communicate, expressive aphasia and will require total skilled nursing care the rest of her life. (Ex P-6)

The Sumrall family members were called and testified pertaining to the catastrophic damage to their mother and wife. Notably, Nina Musgrove, Della Sumrall's daughter who was present in the hospital room when Chequita Steele removed the central line, testified that her mother was sitting straight up in a bedside chair at a 90 degree angle when Steele pulled the central line. She confirmed her mother immediately gasped for breath, cried out "I can't breathe" and became unresponsive. (TR 149-165) Plaintiff's medical bills totaled over $609,493.13. (Ex P-3)

As opposed to the evidence presented by Plaintiffs, Defendant called only three witnesses, a retained expert, Dr. Jim Corder (anesthesiologist), Dr. Edward Dvorak (the surgeon who performed gall bladder surgery) and Chequita Steele, a non-expert fact witness. None of the three witnesses professed to know the standard of care of a registered nurse removing a central line and none of the three witnesses was even tendered as an expert in the field of nursing. (TR 302-339, 340-397, 398-415) Dr. Dvorak specifically stated he was not qualified to testify on the nursing standard of care. (TR 399)

Over Plaintiffs' adamant objection, Dr. Corder was allowed to state his bald conclusion that Chequita Steele "did not breach the standard of care," and that "there is no national standard of care." (TR 342-346) Corder also opined (again over Plaintiffs' objections) that "Dr. Weldon thought she had a stroke and I think she had a stroke." (TR 379-380) Dr. Corder admitted he had never read Dr. Weldon's deposition and did not know that Weldon stated under oath he had no opinion as to whether the patient had a stroke. (TR 391-392) Plaintiffs' counsel objected and pointed out to the court that nowhere in the pre-trial disclosures of Dr. Corder's opinions were there any disclosures that he would:

1. Identify the nursing standard of care;
2. Testify that Della Sumrall had a stroke;
3. Testify that Della Sumrall had a heart attack.

Judge Krebs called a halt to the trial and went back in chambers for a long time to again re-read Defendant's expert designation and disclosures. (TR 342-346) Judge Krebs sustained objection to Corder testifying that Mrs. Sumrall had a heart attack (TR 376-378), but inexplicably allowed Corder to testify "I think she had a stroke" (TR 379-380) and inexplicably allowed Corder to testify that Chequita Steele did not breach the nursing standard of care even though Corder was never tendered nor qualified as an expert in nursing. (TR 342-346) (CR 800) Nurse Chequita Steele testified in a non-expert capacity that Mrs. Sumrall "could not tolerate Trendelenberg" because Mrs. Sumrall "had trouble breathing" at some undefined, undated, undocumented time in the past. Steele admitted she made no attempt whatsoever to position Mrs. Sumrall prior to removing the central line on February 29, 2012, but contended that the patient was "between 30 degrees and 45 degrees, closer to 45 degrees" when the central line was pulled. (TR 302-339) Steele admitted that she testified previously on her deposition the patient was "less than 90 degrees" but had refused to answer whether this was more or less than 30

degrees, or more or less than 45 degrees. (TR 318-320) Steele gave no explanation for her newly discovered memory.

Notably, Defendant failed to call any nursing care expert, including the two nurses previously designated by Defendant, and including the entire nursing staffs of Ocean Springs Hospital and Singing River Hospital who were readily available. (CR 341) (RE 63-65)

Plaintiffs called no rebuttal witnesses. Judge Krebs took the case under advisement on December 11, 2013. Judge Krebs entered his Findings of Fact and Conclusions of Law on April 29, 2014. In his findings, Judge Krebs found there was no applicable nursing standard of care, that there was no air embolism, there was no breach of the standard of care and that Mrs. Sumrall suffered a stroke when pressure was applied to the jugular vein, loosening plaque, occluding the vein and causing a stroke. (CR 1324) (RE 36-41)

This appeal followed.

SUMMARY OF THE ARGUMENT

The trial judge committed reversible error by allowing testimony of Dr. Jim Corder, an anesthesiologist, relating and pertaining to the nursing standard of care. Dr. Corder was not designated, not qualified, and not tendered as a nursing expert. *Troupe v. McAuley,* 955 So.2d 848 (Miss. 2007); *Poole v. Avara*, 908 So.2d 716 (Miss. 2005); *Hubbard v. Wansley*, 954 So.2d 951 (Miss. 2007). An expert witness is not allowed to state a conclusion pertaining to breach or non-breach of the standard of care without articulating and defining the standard of care to which he is referring. *Saucier v. Hawkins*, 113 So.3d 1277 (Miss. App. 2013)

The trial judge erred in denying Plaintiffs' motion for partial summary judgment establishing the nursing standard of care when Plaintiffs' sworn proof defining the nursing standard of care was met merely by argument of Defense counsel. *Dailey v. Methodist Medical*

Center, 790 So.2d 903 (Miss. App. 2001) (documents stating what a party expects his expert to say do not rise to the level of competent, credible affidavits); Rule 56, Miss. R. Civ. P.; *Potter v. Hopper,* 907 So.2d 376 (Miss. Ct. App. 2005)

The trial judge erred in requiring Plaintiffs to prove their case by overwhelming proof rather than by a preponderance of the evidence. *Singley v. Smith*, 844 So.2d 448 (Miss. 2003); *Gregory v. Williams,* 35 So.2d 451 (Miss. 1948).

The trial judge's findings of fact and conclusions of law was against the overwhelming weight of the evidence. There was overwhelming evidence establishing the nursing standard of care both by expert testimony and documentary evidence. The Plaintiff Della Sumrall was irrefutably able to tolerate Trendelenberg position as Singing River Health System's own nurses and doctors put her in Trendelenberg position. The trial judge's finding of no air embolism, but rather a stroke is based on a gross lack of understanding of the medicine, science and anatomy, and is directly contradicted by every treating physician and the multiple admissions of Defendant's own employees.

The court's findings simply were not supported by substantial evidence. *Upchurch Plumbing, Inc. v. Greenwood Utility Com'n.,* 964 So.2d 1100 (Miss. 2007)

The multiple individual errors by the trial judge, even if not reversible by themselves, constitute cumulative error which requires reversal. *Estate of Hunter v. Gen. Motors Corp.,* 729 So.2d 1264 (Miss. 1999); *Illinois Central R. Co., v. Clinton,* 727 So.2d 731 (Miss. App. 1998).

INTRODUCTION

Circuit judges have the power to destroy cases. A nod of the head, raised eyebrows of astonishment, a tone of voice, a critical evidentiary ruling, can put a thumb on the scales of justice in a jury trial so subtly one can hardly notice. Other circuit judges, on the other hand can

use the judicial gavel as a club, smashing everything in the case through rulings and findings and assuring the case's outcome. A circuit judge can and absolutely does assure the outcome in a State Tort Claims Act case where the judge sits without a jury and makes all decisions on evidence as well as the decision on the ultimate outcome.

From refusing to enforce subpoenas issued by the Plaintiff, to allowing Defendants to refuse 38 dates to set one deposition, to imposing thousands of dollars in fact witness "fees," to allowing an unqualified and untendered expert to give undisclosed and undesignated opinions at trial, to a failure to acknowledge undisputed facts set forth in the medical record by multiple doctors, to a failure to either read or failure to heed applicable medical literature, to a complete lack of understanding of the medical science, the record in this case is replete with evidence of reversible error.

This appeal is to illuminate the course of conduct by the trial judge here which eviscerated Plaintiffs' case and denied a fair trial.

Judge Krebs' theory and finding that Della Sumrall had a stroke caused by pressure being applied to the jugular vein, loosening plaque, and causing a stroke is, in a word, nonsensical. No witness in this case ever said such a thing. The Defense expert, Dr. Corder, casually mentioned that some patients with plaque in the carotid arteries can have the plaque dislodged by pressure causing a stroke. He never said this is what happened to Della Sumrall.

Dr. Corder was talking about the arterial system, not the venous system. Judge Krebs apparently thinks Mrs. Sumrall's jugular vein was part of her arterial system which it was not. Judge Krebs thinks there was plaque in the jugular vein, which is a medical and scientific impossibility. Plaque forms from pressure in our arterial system, not the venous system. Judge Krebs ruled plaque was dislodged, occluding the jugular vein, which never happened and no one other than Judge Krebs said this happened.

STANDARDS OF REVIEW

The standard of review for the admission or exclusion of evidence, such as expert testimony, is an abuse of discretion. *Barrow v. May,* 107 So.3d 1029 (Miss. App. 2012). The appellate court will not overturn the trial court on an evidentiary issue unless the trial court abused its discretion or was clearly erroneous. *Worthy v. McNair,* 37 So.3d 609 (Miss. 2010)

Appellate review of a ruling of law – such as changing the burden of proof to overwhelming rather than preponderance of the evidence – is *de novo revue*. *Harrison County v. City of Gulfport,* 557 So.2d 780 (Miss. 1990); *Smith v. Dorsey,* 599 So.2d 529 (Miss. 1992); *City of Jackson v. Presley,* 40 So.3d 520 (Miss. 2010); *Fairley v. George County,* 800 So.2d 1159 (Miss. 2001).

The standards of review for denial of summary judgment is *de novo revue*. *Moore ex rel. Moore v. Memorial Hospital at Gulfport,* 825 So.2d 658, 663 (Miss. 2002). The evidence is examined in the light most favorable to the non-moving party. The movant is entitled to judgment as a matter of law if there is no genuine issue of material fact. The party opposing summary judgment may not rest on mere denial in his pleadings or upon argument of counsel. Miss. R. Civ. P, Rule 56

Review of findings of fact is the manifest error/substantial evidence rule. The appellate court will overturn the trial judge's finds of fact if the trial judge abused his discretion, was manifestly wrong, clearly erroneous or applied the wrong legal standard. *City of Jackson v. Perry,* 764 So.2d 373 (Miss. 2000); *Biddix v. McConnell,* 911 So.2d 468 (Miss. 2005); *Denson v. George,* 642 So.2d 909 (Miss. 1994). A trial judge's findings must be supported by substantial, credible and reasonable evidence. *Upchurch Plumbing, Inc. v. Greenwood Utility Com'n.,* 964 So.2d 1100 (Miss. 2007)

ARGUMENT

I. WHETHER DEFENDANT'S SOLE PHYSICIAN EXPERT WITNESS SHOULD HAVE BEEN ALLOWED TO TESTIFY THAT THERE WAS NO BREACH OF THE NURSING STANDARD OF CARE WITHOUT BEING TENDERED OR QUALIFIED AS A NURSING CARE EXPERT AND WITHOUT ARTICULATING ANY NURSING STANDARD OF CARE WHATSOEVER.

Dr. Jim Corder, an anesthesiologist, was Defendant's sole physician expert witness. Defendant's entire expert disclosure as to Dr. Corder's expected opinions and qualifications is contained in the record at CR 341-343; RE 63-65. The entire two sentence designation as to standard of care testimony is:

> It is expected that Dr. Corder will opine that the medical personnel of SRHS, including but not limited to Chequita Steele, did not deviate from the standard of care with respect to their care and treatment of Della Sumrall.
> …
> Dr. Corder is expected to testify that Nurse Steele's removal of Plaintiff's central line was within the applicable nursing standard of care.

(RE 63-64)

Upon receiving Defendant's designation, Plaintiffs filed a Motion to Exclude Defendant's Expert Opinions on Alleged Compliance with the Standard of Care. (CR 800) Plaintiffs informed the court that Defendant's conclusory statement of no breach of the standard of care was grossly deficient and inadmissible, that Dr. Corder never stated what the standard of care was and that Dr. Corder never stated his qualifications or knowledge of nursing standards.

The court overruled Plaintiffs' motion without comment prior to trial. (CR 1305) (RE 34)

The judge's denial of Plaintiffs' motion to exclude Defendant's experts' opinions was reversible error. *Mallet v. Carter*, 803 So.2d 504 (Miss. App. 2002) (expert's affidavit which stated defendant breached the standard of care is properly stricken where expert failed to set forth what standard of care was). *Maxwell v. Baptist Memorial Hospital-DeSoto, Inc.*, 15 So.3d 427 (Miss. App. 2008) (failure of expert to set forth the applicable standard of care is fatally defective despite stating mere conclusion of breach of standard of care). See *Coltharp v.*

Carnesale, 733 So.2d 780 (Miss. 1999) (defense expert properly excluded due to failure to provide notice that avascular necrosis was his theory on causation … such failure to disclose amounts to trial by ambush).

At trial, Dr. Corder was tendered and qualified only as an anesthesiologist and internist. (TR 346-347) He was never tendered as an expert in the nursing standard of care and gave no testimony whatsoever as to his knowledge, training and experience in nursing standards or as to the specialty of nursing. (TR 340-397)

Plaintiff again strenuously objected and requested the court to preclude Dr. Corder from stating his bald conclusion of no breach of the nursing standard of care as he had not been designated, he was not qualified, he was not tendered as a nurse expert and his opinions had not been disclosed. (TR 342-346) The court stopped the trial, retired to chambers, re-read Defendant's disclosure, returned to the courtroom and stated "plaintiff was on notice that he was going to discuss standard of care, so I am going to let him testify." (TR 342-346)[7]

To put it mildly, this ruling was gross error. Our Mississippi Supreme Court has instructed trial judges that conclusory denials will not be tolerated and are to be deemed inadmissible. This common sense rule requiring more than mere conclusory denials was graphically illustrated in *Nichols v. Tubb*, 609 So.2d 377 (Miss. 1992). In *Nichols*, the defendant contended his supplementary answers to expert interrogatories denying breach of the standard of care were sufficient. The court commented:

> Dr. McDonald's supplemental answers listed four additional experts who would testify, including himself, but again the only information as to any of these experts was that they would testify that Dr. McDonald met the appropriate standard of care and did not do or fail to do anything which caused Mrs. Nichols' paralysis.

[7] Notice of the subject matter of potential testimony provides no notice of opinions. Both subject matter and opinions are required to be disclosed by the express language of M. R. Civ. P Rule 26(b)(4).

> …
> These answers were as foolish and dangerous as they were arrogant. They contained no more information than a pleading. Had this matter gone to trial with no more answer than this the circuit judge would have been acting well within his discretion in excluding all the specific facts and opinions which Dr. Smith and Dr. McDonald expressed. *Square D Co. v. Edwards*, 419 So.2d 1327 (Miss. 1982)
> …
> The Nichols are manifestly correct in their contention that Dr. McDonald did not fully respond to the interrogatory on his expert witnesses.

Nichols v. Tubb, supra

In addition to Defendant's failure to designate or disclose any substantive opinions on nursing standards prior to trial, Dr. Corder was never tendered nor qualified as an expert in nursing standard of care during the trial. (TR 346-347) Failure to tender an alleged expert in the field in which he is to testify makes his testimony inadmissible. *Troupe v. McAuley,* 955 So.2d 848 (Miss. 2007) (where neurosurgeon expert tendered only in the field of neurosurgery, he will not be allowed to testify on the standard of care of an ENT). See also *Poole v. Avara,* 908 So.2d 716 (Miss. 2005) (failure to tender witness as an expert makes testimony inadmissible).

In addition to failure to designate and failure to tender as a nursing expert, there was absolutely zero evidence before Judge Krebs that Dr. Corder had any knowledge or experience whatsoever as to what the nursing standard of care was or whether one existed. (TR 340-397) While Dr. Corder was familiar with the "subject" of removal of central lines, he provided no testimony that he was familiar with the "specialty" of nursing. An expert who is familiar only with a subject, but not a specialty, cannot testify about the standard of care of that specialty. *Hubbard v. Wansley,* 954 So.2d 951, 958 (Miss. 2007); citing *West v. Sanders Clinic for Women, P.A.,* 661 So.2d 714, 719 (Miss. 1995).

This court has repeatedly held that the mere fact that an expert does not practice a particular specialty does not bar his/her testimony in more than one specialty, but the expert must

have knowledge and experience in the specialty in which he intends to testify, otherwise he is not qualified to speak. See *Hubbard v. Wansly*, 954 So.2d 951 (Miss. 2007); *Partin v. N. Miss. Med. Ctr., Inc.*, 929 So.2d 924 (Miss. App. 2005); *Hans v. Memorial Hospital at Gulfport*, 40 So.3d 1270 (Miss. App. 2010) (gastroenterologist cannot testify as to E.R. doctor standard of care).

In addition to failure to designate, failure to tender and failure to qualify as a nursing care expert, Dr. Corder failed to articulate what the alleged nursing standard of care was that he was talking about. (TR 340-397) Would this court contemplate allowing an expert to testify that a driver exceeded or did not exceed the speed limit without the expert knowing what the speed limit was? Would this court contemplate allowing an appraiser to state his conclusion as to the property value without knowing and articulating appropriate appraisal criteria and principles? Would a referee be allowed to conclude a team should receive a first down without knowing a first down requires advancing 10 yards?

Our courts have repeatedly disallowed medical expert testimony where the proffered expert does not have knowledge of or does not articulate the standard of care of the specialty he is addressing. See *Saucier v. Hawkins*, 113 So.3d 1277 (Miss. App. 2013) (expert testifies "there is a standard of care that is taught at various universities," but failed to say what standard of care was – held directed verdict proper); *Hans v. Memorial Hospital at Gulfport*, 40 So.3d 1270 (Miss. Ct. App. 2010) (summary judgment proper where nothing in expert's affidavit stated what standard of care was or what "adequate transfer of care" was); *Mallet v. Carter*, 803 So.2d 504 (Miss. App. 2002) (expert's affidavit fails to meet the test of legal sufficiency when expert simply says there was breach of standard of care but fails to state what standard of care was); *Cheeks v. Bio-Medical Applications, Inc.*, 908 So.2d 117 (Miss. 2005) (any expert must be familiar with the standard of care he/she is addressing); *Boyd v. Lynch*, 493 So.2d 1315 (Miss. 1986) (physician cannot automatically testify as to nursing standard of care)

There simply is no room for argument on this assignment of error. Dr. Corder was not designated as a nursing expert, not qualified as a nursing expert and not disclosed as a nursing expert. Dr. Corder was never tendered at trial as a nursing expert and never professed any knowledge, training or education on nursing standards. It was reversible error of the first magnitude to allow him to testify regarding compliance with the nursing standard of care or whether nursing standards did or did not exist.

II. WHETHER THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ESTABLISHING THE NURSING STANDARD OF CARE.

Prior to the commencement of trial, Plaintiffs filed a motion for partial summary judgment seeking an order establishing the applicable nursing standard of care as being that as stated by Plaintiffs' experts, Dr. Vives (double board certified vascular neurologist) and Crystal Keller (registered nurse). (CR 834) In support of their motion Plaintiffs submitted the Plaintiffs' sworn designation of Vives and Keller's testimony, the sworn and signed depositions of Vives and Keller and overwhelmingly and authoritative medical literature. (See list of literature at pp 23-24 of this Brief) (CR 834-872). A pertinent authority cited was

The Infusion Nursing Society Standards of Practice, (INS) S58 provides as follows:

Practice Criteria

> III. Nontunneled Central Vascular Access Devices (CVADs)
>
> F. Caution should be used in the removal of a non-tunneled CVAD, including precautions to prevent air embolism. Digital pressure should be applied until hemostasis is achieved by using manual compression and/or other adjunct approaches such as hemostatic pads, patches, or powders that are designed to potentiate clot formation. The nurse should apply petroleum-based ointment and a sterile dressing to the access site to seal the skin-to-vein tract and decrease the risk of air embolus. **When removing the CVAD, the nurse should position the patient so that the CVAD insertion site is at or below the level of the heart to reduce the risk of air embolus.**

Infusion Nursing Standards of Practice, S58.

> Air Embolism
>
> Prevention – During CVAD removal:
>
> - **Position the patient with the catheter exit site at or below the level of the heart.**
> - Instruct the patient to perform Valsalva's maneuver as the last catheter segment is withdrawn from the vein.
>   - Contraindications to use of Valsalva's maneuver include aortic stenosis, recent myocardial infarction, glaucoma, and retinopathy.
> - Place pressure on the site until hemostasis is achieved; apply an occlusive dressing consisting of sterile petroleum-based ointment, sterile gauze, and cover with tape or a transparent semipermeable membrane dressing.
> - Change dressing every 24 hours until exit site is healed.
> - Maintain the patient in a supine position for 30 minutes after catheter removal.

Policies and Procedures for Infusion Nursing, 4th Edition, 2011; p 118 (E*mphasis added)*

The Plaintiffs' experts, Dr. Lidgia Vives and Nurse Crystal Keller both articulated these same standards in their designations and in their sworn depositions. (CR 834; Motion for Partial Summary Judgment with Ex A-D)

In response to Plaintiffs' motion for partial summary judgment, Defendants submitted no affidavits, no depositions and no admissible evidence whatsoever. (CR 1230-1236; CR 1099-1102) Defendants chose to rely solely upon argument by its counsel. Defense counsel argued that Defendant had no duty to articulate the standard of care and that other patients under other circumstances in other hospitals did not require Trendelenberg positioning, therefore Mrs. Sumrall did not require Trendelenberg.

Rule 56, Miss. R. Civ. P., provides at pertinent part that judgment shall be rendered forthwith when the pleadings, depositions, answers to interrogatories and admissions on file,

together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (Rule 56, Miss. R. Civ. P.). A party is not entitled to rest on mere pleadings and must respond by affidavits or otherwise setting forth specific facts showing there is a genuine issue for trial (Rule 56(e), Miss. R. Civ. P.). *Dailey v. Methodist Medical Center,* 790 So.2d 903 (Miss. App. 2001) (documents stating what a party expects his expert to say do not rise to the level of competent, credible affidavits).

In short, the court at summary judgment stage was presented with Plaintiffs' sworn interrogatories, the sworn depositions of Plaintiffs' two standard of care experts with their respective designations attached and definitive medical literature setting forth with specificity the applicable nursing standard of care. As opposed to this evidence, Defense counsel merely argued through its counsel. Denial of summary judgment based on Defense counsel's argument is reversible error. Rule 56(e), Miss. R. Civ. P. *Stuckey v. Provident Bank*, 912 So.2d 859 (Miss. 2005); *Travis v. Stewart*, 680 So.2d 214 (Miss. 1996)

The trial judge denied Plaintiffs' motion even though there was no dispute on the material fact as to what the standard of care was that was applicable to a registered nurse removing a central line from Della Sumrall. This again was error that substantially affected the rights of the Plaintiffs.

Magee v. Transcontinental Gas Pipe Line Corp, 551 So.2d 182 (Miss. 1989) (non-moving party cannot rely on unsworn allegations in the pleadings or on arguments in briefs; if he chooses to remain silent other than unsworn argument, he does so at his peril); *Starnes v. City of Vardaman,* 580 So.2d 733 (Miss. 1991) (where nothing is furnished in opposition to motion for summary judgment which provides any merit to the non-moving party's claims, summary judgment is proper); *Potter v. Hopper,* 907 So.2d 376 (Miss. App. 2005) (a letter not in affidavit form is insufficient response to motion for summary judgment; even if the content of the letter

were considered a conclusion as to breach of the standard of care it is insufficient if the expert does not announce the standard of care).

III. WHETHER THE TRIAL JUDGE ERRED IN REQUIRING PLAINTIFFS' BURDEN OF PROOF TO BE OVERWHELMING AS OPPOSED TO A PREPONDERANCE OF THE EVIDENCE.

During Plaintiffs' counsel's 37 years of practicing law, the undersigned has been under the impression that the Plaintiffs' burden of proof has always been to prove contested matters by a preponderance of the evidence. In fact, model jury instructions promulgated by the Mississippi Judicial College repeatedly state that preponderance of the evidence is the rule which governs our jurisprudence. See MJI C.25 (the party who claims that certain facts exist must prove them by a preponderance of the evidence. This obligation is known as the burden of proof). See also, MJI C.28 (the phrase preponderance of the evidence means that evidence which is most consistent with the truth … it does not depend on the number of witnesses … it is that evidence which … has greater persuasive and convincing power).

Mississippi law has used the preponderance of the evidence standard since before the undersigned was born. See *St. Louis San Francisco Ry. Co .v. Dyson*, 43 So.2d 95, 207 Miss. 639, (Miss. 1949) (party having the burden is required to prove his case by a preponderance of the evidence); *Gregory v. Williams,* 35 So2d 451, 203 Miss. 455 (Miss. 1948) (preponderance of the evidence refers to evidence which, by comparison with other evidence, has more convincing force and outweighs the other as to probabilities).

Plaintiffs' counsel was mindful of this burden of proof by preponderance of the evidence as we introduced voluminous medical literature and multiple expert witnesses verifying the nursing standard of care for a registered nurse removing a central line.

Despite this mountain of evidence, Judge Krebs decided there was no standard of care and therefore no breach of the standard of care. (CR 1324-1329) (RE 36-41) To get to this remarkable conclusion, Judge Krebs changed the burden of proof from preponderance of the evidence to a requirement of overwhelming evidence. Judge Krebs' exact language from his Findings of Fact and Conclusions of Law was:

> No one position of a patient during central line removal was so overwhelmingly required, that there truly was no uniformity that would equate to a standard of care to be followed by nurses.
> …
> Plaintiff failed to prove a true standard of nursing care for the removal of a central line that would apply to the procedure performed by Nurse Steele here.

(CR 1326) (RE 38, 40)

First, Judge Krebs' finding and conclusion is based on the testimony of Dr. Corder who should not have been allowed to testify at all on nursing standards for reasons cited in Section I of this brief.

Secondly, Plaintiffs never had a burden of proof to prove anything overwhelmingly, and it is reversible error to hold Plaintiffs to such quantum of proof. *Singley v. Smith,* 844 So.2d 448 (Miss. 2003); *Gregory v. Williams,* 35 So.2d 451 (Miss. 1948)

In addition to changing the Plaintiffs' burden of proof from preponderance of the evidence to overwhelming, it is notable Judge Krebs failed to cite a single word of a single piece of medical literature in his opinion. Instead, he makes broad conclusory statements such as "there is no recognized applicable standard of nursing care with regard to patient positioning during the removal of a central line," and "the widely varying literature and policies clearly demonstrate that some recline is preferred during the removal process, but it also depends on the condition and tolerance of the individual patient." (CR 1326) (RE 38)

Before we cite the voluminous medical literature on central line removal, let us emphasize one salient fact – no medical literature, no witness, no hospital policy, no hospital standard, approves, authorizes or permits the removal of a central line from a person sitting up in a chair such as Della Sumrall! We should not lose sight of the fact that the issue before the court is the standard of care for the nurse removing the central line of Della Sumrall. As succinctly put by Singing River Health System's own Dr. John Weldon – That's not the right way to do it. (Ex P-5; p 44)

Following are the highlights of the medical literature cited as authoritative and relied upon by Dr. Vives and Nurse Keller:

A. ***Standards of the Infusion Nursing Society*** **S58**: Caution should be used in the removal of a non-tunneled CVAD, including precautions to prevent air embolism. Digital pressure should be applied. … The nurse should apply petroleum-based ointment and a sterile dressing to the access site to seal the skin-to-vein tract and decrease the risk of air embolus. … [T]he nurse should position the patient so that the CVAD insertion site is at or below the level of the heart to reduce the risk of air embolus.

(TR 27-29)

B. **Johns Hopkins Clinical Practices**: During removal of … internal or external jugular vascular access device, it is imperative that the patient be placed in the Trendelenberg position in order to prevent air embolism.

(TR 30-32)

C. **CMS "Never" Events**: Air embolism in a hospital setting is listed as a "never" event … Medicare will no longer pay for the extra cost of treating air embolism occurring in a hospital setting.

(TR 33-34)

D. **Coventry Health Care**: The National Quality Forum defines never events as errors in medical care that are clearly identifiable, preventable, and serious in their consequences.

(TR 33-34)

E. **Department of Health**: Never events are defined as serious, largely preventable safety incidents that should not occur if available preventive measures have been implemented.

(TR 35)

F. ***Nursing Times*** on Avoiding Air Embolism: Lists the 5 key points of nursing standards which are 1) educate the patient; 2) place the patient supine … they

should not be sitting or upright; 3) get patient to hold breath and perform Valsalva maneuver; 4) if patient cannot comply, remove at end of inspiration; 5) cover with sterile gauze, apply pressure, cover with occlusive dressing.

(TR 35-38)

G. ***Military Medicine***: When removing the catheter, place the patient in supine or Trendelenberg position.

(TR 39-40)

H. ***MedSurg Nursing*:** Positioning during central line removal is a critical intervention to prevent air embolism.

(TR 41-42)

I. **Anesthesia Analog & Mayo Clinic**: Because the outcome of inadvertent venous air embolism associated with the removal of a central line can be disastrous if not fatal, we wish to alert anesthesiologist and other physicians to this potential complication. Although measures to prevent air embolism are commonly taken during insertion … by use of Trendelenberg and having patient hold breath, we wish to stress similar measures should accompany removal of the catheter.

(TR 42-43)

J. ***British Journal of Nursing**:* Table 3 describes the steps in nursing standards to prevent air embolism. These steps include position patient in Trendelenberg, perform Valsalva maneuver, apply pressure and apply occlusive dressing.

(TR 45-46)

Judge Krebs was given a copy of each of these articles (Ex P-14), was read the pertinent portion relied upon by the witness and was informed this literature was authoritative. For Judge Krebs to require overwhelming proof as opposed to preponderance of the evidence defies explanation and is clearly reversible error.

IV. WHETHER THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Upon reading Judge Krebs' Findings of Fact and Conclusions of Law, the reader will quickly discern that the trial judge ruled in the Defendant's favor on every conceivable issue no matter whether conflicting evidence was great, small or nonexistent. Judge Krebs held that a standard of care did not exist; if one existed it was not breached; if the standard of care was breached it caused no injury; there was evidence Della Sumrall could not tolerate Trendelenberg, so it was not wrong to pull the central line while she was sitting up in a chair; there was no air

embolism and this incident was really a stroke; if the event was not a stroke, "perhaps" it was a cardiac event along with a stroke. (CR 1324-1329) (RE 36-41) A litany of one-sided conclusions rightfully makes one suspect that evidence was not fairly weighed by the decision maker. Indeed the court's opinion is remarkably similar to the law school curriculum on how a lawyer defends his first dog bite case – I don't have a dog. My dog does not bite. If my dog bit you, you must have provoked him. [Many thanks to Gus Abbott]

Examination and review of the evidence presented below will make a suspicion of unfairness become a firm conviction that Plaintiffs did not receive a fair trial, and that the overwhelming weight of the evidence requires a new trial.

Judge Krebs: A Standard Of Care Does Not Exist.

Judge Krebs found that "plaintiff failed to prove a true standard of nursing care … without an applicable standard of care, there can be no breach of such." (CR 1328) (RE 40)

We have largely addressed this issue above in Sections II and III so the medical literature need not be repeated here. Each of Plaintiffs' experts testified under oath that the applicable standard of nursing care required the steps of 1) educate the patient, 2) position the patient in Trendelenberg, 3) get patient to perform Valsalva maneuver, 4) hold pressure and apply occlusive gauze.

Both of Plaintiffs' experts testified further that a supine position may be utilized if the patient cannot tolerate Trendelenberg, such as if the patient has an unusual presentation such as an inter-cranial injury. Both experts emphasized that there was no indication that Della Sumrall could not tolerate Trendelenberg and in fact the evidence was un-contradicted that Mrs. Sumrall was repeatedly able to tolerate both supine and Trendelenberg and most certainly laid in her bed less than 30 degrees.

The medical record reflects that on February 28, 2012 at 16:30 the HOB (head of bed) was less than 30 degrees without any difficulties. (Ex P-1; p 1383; TR 336-337) This was 24 hours before the February 29 incident.

On February 29, 2012, the rapid response team picked up Della Sumrall from the chair and placed her flat on the bed (supine) right in front of Chequita Steele without one word being spoken by Steele that the patient "could not tolerate" lying supine. (TR 333) (Ex P-1)

On March 19, 2012, Nurse Jenna Blaine placed Della Sumrall in Trendelenberg position in front of a Singing River Health System patient care representative to remove a second central line. (TR 191-195) Nurse Blaine testified Mrs. Sumrall was able to tolerate Trendelenberg and she would not have placed her in this position unless she could tolerate it. (TR 195) Mrs. Blaine testified that she was trained by Singing River Health System to use Trendelenberg to remove central lines. (TR 194-195) Singing River Health System called no one to refute Nurse Blaine's testimony.

In August 2012, Della Sumrall was again placed in Trendelenberg position to remove a third central line, this time by a Singing River Health System employee staff physician. (TR 261-263) Again this was done without difficulty or any alleged "lack of toleration." (TR 263)

The Sumrall family testified they had personally seen their mother/wife lying flat in bed (supine) hundreds of times including while in the hospital in the days prior to the February 29, 2012 incident. (TR 153)

As opposed to this overwhelming testimony, the absolute only evidence of any "lack of toleration" came from the lips of one Chequita Steele, the nurse who pulled the central line. Nurse Steele testified Sumrall "could not tolerate" lying flat at some undocumented, unwitnessed, untimed date in the past when Steele positioned the head of her bed. (TR 320-321, 327-329) Steele admitted she made no attempt to position Mrs. Sumrall at the time of central

line removal. (TR 325, 330) It should be noted Ms. Steele never told anyone about such a "lack of toleration" event until her deposition, prior to which she was given a copy of a Singing River Health System policy that said a patient should be positioned 0 degrees to 30 degrees, or "as tolerated" prior to central line removal. (TR 327-328) After reading Singing River Health System's policy with the "as tolerated" language, Ms. Steele adopted the use of the words "could not tolerate" as her mantra throughout the case. These words are nowhere to be found in this medical record. (TR 327) Moreover, Nurse Steele never testified that she ever put Della Sumrall in the Trendelenberg position at any time in her life, thus making any conclusion by Ms. Steele utter speculation and conjecture.

Judge Krebs used Chequita Steele's uncorroborated, undocumented, unsubstantiated testimony to conclude there was "some evidence" Della Sumrall "could not tolerate" Trendelenberg despite overwhelming evidence to the contrary.

Judge Krebs: There Was No Air Embolism / This Was A Stroke Or Perhaps A Cardiac Event

After deciding there is no standard of care (despite overwhelming medical literature and medical testimony to the contrary), after deciding there was evidence Mrs. Sumrall could not tolerate Trendelenberg (despite irrefutable evidence she could and did), Judge Krebs next concluded that there never was an air embolism but rather this event was a stroke or "perhaps" some cardiac event. (CR 1325, 1327) (RE 37)

To reach this conclusion, Judge Krebs had to disregard the un-contradicted medical record entries by six (6) doctors who cared for Mrs. Sumrall (many of whom were employed by Defendant Singing River Health System), the testimony of the only physician stroke expert who testified, the findings of oxygen saturation level of 28, the presence of myoclonic seizures, the absence of any lab evidence of a stroke, the absence of any imaging evidence of a stroke, and the absence of any test whatsoever showing a stroke. Rather than accepting any of this

evidence and the contemporaneous documented opinions of six doctors, Judge Krebs pronounced that Defendant's anesthesiologist expert (Dr. Corder) "opined that pressure applied to the removal site on the jugular vein loosened plaque that was occluding the vein and caused the stroke." (CR 1327) (RE 39)

The breadth and depth of Judge Krebs' lack of understanding of the medical evidence in this case is difficult to comprehend. In the first place, Dr. Corder never made a statement that plaque was in the jugular vein, nor would any competent medical doctor. Humans do not have plaque in our veins; we have plaque in our arteries. Human beings' venous system is separate from our arterial system. Dr. Corder's only testimony concerning loosened plaque was a side comment about plaque in the carotid arteries of some people "can" break off – he never said this is what happened to Della Sumrall, nor would he. (TR 370-371) Such an event (loosening of plaque in the carotid arteries causing a stroke) would cause a stroke in the brain which would show up on a CT scan. Della Sumrall's CT scan showed no evidence of a stroke and was perfectly consistent with global anoxic encephalopathy (watershed injury) which occurs on a cellular level when the whole brain is deprived of oxygen because of pulmonary arrest caused by an air embolism. (TR 69-71)

There is little need for further lengthy discussion about the overwhelming weight of the evidence because Judge Krebs is simply using testimony that never occurred to justify an erroneous conclusion that is a medical and scientific impossibility. The overwhelming weight of the testimony was that a standard of care does exist; it was breached and caused an air embolism and anoxic brain damage. A trial judge's findings must be supported by substantial, credible and reasonable evidence. *Upchurch Plumbing, Inc. v. Greenwood Utility Com'n,* 964 So.2d 1100 (Miss. 2007)

V. WHETHER CUMULATIVE ERRORS DENIED PLAINTIFFS A FAIR TRIAL.

The Mississippi Supreme Court has often held that while litigants are not entitled to a perfect trial, they are entitled to a fair trial. *Blake & Jackson Bone & Joint Clinic, LLP v. Clein*, 903 So.2d 710 (Miss. 2005); See also *Ekornes – Duncan v. Rankin Med. Center*, 808 So.2d 955 (Miss. App. 2002); *Parnes v. Illinois Cent. Gulf R.R.*, 440 So.2d 261 (Miss. 1983).

While individual errors may not have been reversible themselves, they may combine with other errors to constitute reversible error. *Estate of Hunter v. Gen. Motors Corp.*, 729 So.2d 1264 (Miss. 1999); *Illinois Cent. R. Co. v. Clinton*, 727 So.2d 731 (Miss. App. 1998).

In this case, the record is replete with error from beginning to end:

1. Judge Krebs refused to enforce duly served subpoena and notice of deposition. (CR 23) (RE 24) This ruling violates Rule 45 which gives litigants the right of subpoena to compel witness testimony.
2. Judge Krebs created a new local court rule, without approval by Mississippi Supreme Court or other circuit judges, that all fact witnesses "including doctors, lawyers, Indian chiefs, street sweepers and anybody who holds a job, if he can prove it" shall be paid a reasonable hourly fee for responding to a subpoena. (CR 123) (RE 48-49) This rule violates § 25-7-47 Miss. Code Ann. (1972) (setting witness fees), and Rule 501, Mississippi Rules of Evidence. [8]
3. Judge Krebs refused to award Plaintiffs attorney's fees for time expended in preparing for and attending the deposition of Chequita Steele where Steele was told by Defense counsel to leave the deposition and Defense counsel simply refused to

[8] Please note Plaintiffs do not appeal the ruling as to Dr. Dvorak only which has been resolved. See Interlocutory Appeal, *Sumrall v. Dvorak*, Cause No. 2012-00129(1).

attend. This ruling violates Rule 37(e), Failure of Party to Attend Own Deposition. (CR 294) (RE 27)

4. Judge Krebs dismissed Defendant Ocean Springs Hospital from this action despite the Defendant's response in requests for admissions that Ocean Springs Hospital was Chequita Steele's employer. (CR 24, 29) (RE 33, 50) This ruling violates basic due process as Defendants failed to produce any evidence to justify dismissing Steele's employer.
5. Judge Krebs denied Plaintiffs' motion *in limine* as to undisclosed medical opinions. (CR 1305) (RE 34) This order violated Rule 26(b)(4), Miss. R. Civ. P., which provides a party is entitled to discover expert opinions and the basis of same. See also, *Nichols v. Tubb, Supra* (all opinions shall be disclosed).
6. Judge Krebs denied Plaintiffs' motion to exclude defendant's expert opinions on alleged compliance with standard of care. (CR 1305) (RE 34) The refusal to bar Defendant's expert's conclusory denials of breach of standard of care is discussed at length in Section I above.
7. Judge Krebs denied Plaintiffs' motion for partial summary judgment determining the applicable standard of care. (CR 1305) (RE 34) This ruling was erroneous for all the reasons set forth in Section II of this brief. Plaintiffs' experts were the only qualified standard of care experts in the case and the only witnesses who stated what the standard of care was. This testimony was unrefuted and partial summary judgment should have been granted. Rule 56, Miss. R. Civ. P.
8. At trial, Judge Krebs allowed an unqualified, untendered expert to testify to undisclosed opinions. (See Section I in this brief)

9. In the Findings of Fact and Conclusions of Law, Judge Krebs concluded Plaintiffs had not provided "overwhelming" evidence of the standard of care, thus converting Plaintiffs' burden of proof to overwhelming rather than preponderance of the evidence. This ruling was plain error as set forth above in this brief at Section III.

WHAT YOU ALLOW WILL CONTINUE

It is hopefully obvious to the reader that this judgment cannot stand. Pre-trial rulings made it nearly impossible for Plaintiffs to properly prepare for trial. Evidentiary rulings during the trial admitted expert opinions from an expert who was not tendered, was not qualified and was not designated in the specialty field to which he testified. The trial judge based much of his findings of fact on the unqualified expert's pronouncements and based other findings on a causation theory that was scientifically and medically impossible. We respectfully request that this court:

- Reverse and render on liability;
- Remand with instructions to:
  - Reinstate Ocean Springs Hospital as a defendant;
  - Direct that attorney's fees be assessed for the cancelled deposition of Chequita Steele;
  - Enter summary judgment determining the nursing standard of care;
  - Award damages to Plaintiffs in an amount to be determined at a new hearing.

What you allow will continue.

Respectfully submitted, this the 10th day of December, 2014.

s/ Robert W. Smith
ROBERT W. SMITH, ESQ.
MS BAR NO: 7595
528 Jackson Avenue
Ocean Springs, MS 39564
228 818-5205/ 228 818-5206 FAX
rwmithatty@bellsouth.net

CERTIFICATE OF SERVICE

I, ROBERT W. SMITH, do hereby certify that I have this date electronically filed the foregoing Appellants' Brief with the Clerk of the Court which sent notification of such filing to:

Brett Williams, Esq.
Post Office Box 1618
Pascagoula, MS 39568
bwilliams@dwwattorneys.com

Honorable Robert P. Krebs
Circuit Court Judge
P. O. Box 998
Pascagoula, MS 39568
bobbye@co.jackson.ms.us

SO CERTIFIED, this the 10th day of December , 2014.

s/ Robert W. Smith
ROBERT W. SMITH, ESQ.
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Ocean Springs, MS 39564
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228 818-5206 FAX
rwsmithatty@bellsouth.net